No. 05-588

In The Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware Corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether mineral leases and associated agreements, conditioned upon full compliance with all applicable state and federal laws and discretionary state regulatory approval of mining operations, are "property" protected under the Takings Clause against subsequently enacted environmental protection laws.

2. Whether the rule requiring heightened scrutiny, under the Contracts Clause, of legislation benefiting a state's financial self-interest should be extended to legislation that financially disadvantages the state but furthers important state interests in environmental health and safety.

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In addition to the unofficial report cited in the Petition for Certiorari, the Montana Supreme Court decision is cited in the official Montana Reports at 327 Mont. 306 (2005).

STATEMENT OF THE CASE

1. In 1986 the State of Montana, through its Department of State Lands (DSL), entered into six mineral leases with the predecessor in interest to the principal petitioner Seven Up Pete Venture (Venture). Each mineral lease ran for a primary term of ten years, and as long thereafter as the Venture produced minerals in paying quantities "and all other obligations are fully kept and performed." Pet. App. 4a-5a, ¶¶ 8-9. No lease specifically authorized or mentioned a particular method of mining. Pet. App. 42a.

Each lease provided that "the lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." Each lease authorized mining on any parcel of the leased premises "provided that the [Venture] has first procured the applicable Permits under the Metal Mine Reclamation Act." Pet. App. 17a, ¶ 31. Each lease incorporated an additional term that "no activities shall occur on the tract until an Operating Plan or Amendments have been approved [by the State.]" Pet. App. 5a, ¶ 9.

2. After obtaining the mineral leases in 1991, the Venture took steps to seek regulatory approvals necessary

to mine under the leases, including preparation of an environmental impact statement (EIS) under the Montana Environmental Policy Act, Mont. Code Ann. § 75-1-201 *et seq.*, and application for a mine operating permit under the Montana Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-301 *et seq*. Pet. App. 5a-6a, ¶ 10.

a. In 1993, the Venture entered a Memorandum of Agreement with the DSL regarding the preparation of an environmental impact statement (EIS) for mining operations on both leased and owned lands known collectively as the "McDonald Project." The Memorandum recited that "the proposed Project would utilize . . . heap leaching to extract gold, silver, and other trace metals from ore." A series of contract modifications pertaining to work preparing the EIS followed. None of these EIS-related agreements altered the Venture's duties under the mineral leases. Pet. App. 5a-6a, ¶¶ 10, 12.

In 1994, the Venture applied to the DSL for an operating permit to construct and operate the McDonald Project as a surface mine using cyanide leaching for gold and silver. Pet. App. 6a, ¶ 12. The leases contemplated the operating permit requirement, and recited the applicable standard:

> [The State] shall not approve the Plan until the Lessee has met reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to vegetation, wildlife, wildlife habitat, fisheries, visual qualities and other resources. . . . No work will be conducted without written approval of the Operating Plan.

Pet. App. 16a-17a, ¶ 30.

b. By 1994 it was becoming apparent that, due to the scale and complexity of the McDonald Project, neither the EIS nor the operating permit application process would be complete before the approaching expiration in 1996 of the ten-year primary term for the mineral leases. Therefore, in August 1994, the Venture entered a Mineral Lease Amendment Agreement with the DSL to toll the expiration of the remaining seventeen months of the lease term on the condition that the Venture "actively pursue" an operating permit. The Amendment further provided that "except as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms." Pet. App. 6a, ¶ 11.

c. In July 1998, after the Venture's failure to pay fees relating to services provided by third parties in preparation of the EIS, the Montana Department of Environmental Quality (DEQ, successor agency to the DSL's environmental regulatory duties) issued a stop-work order on the McDonald Project EIS. In September 1998, the Montana Department of Natural Resources and Conservation (DNRC, successor agency to the DSL's leasing duties) notified the Venture that the unexpired seventeen months of the mineral leases' primary term would begin to run again due to the Venture's failure to actively pursue the permitting process. Pet. App. 7a, ¶ 13.

The Venture paid the past-due balance in December 1998, but failed to fund a standing account balance for future work on the uncompleted EIS, or take other steps necessary to reactivate the permitting process. In February 2000, after the remaining seventeen months of the primary lease term had run, the DNRC notified the Venture that the mineral leases had terminated of their own accord. Pet. App. 7a-8a, ¶ 15. The Venture took no

action to further the permitting process, and did not address the pending termination of the mineral leases until they requested an administrative hearing on March 9, 2000, two weeks after the leases expired. Pet. App. 33a-35a, ¶¶ 59-62.

3. Meanwhile, in November 1998, Montana voters approved Initiative 137 (I-137) a statewide ban on open-pit mining for gold and silver using the cyanide heap leaching process, codified at Mont. Code Ann. § 82-4-390. Section 2 of I-137 excluded from the prohibition any mine operating under an existing operating permit as of November 3, 1998. Because the Venture had never obtained an operating permit for the McDonald Project, it was subject to the prohibition. Pet. App. 7a, ¶ 14.

4. On April 11, 2000, petitioners filed a complaint in the United States District Court for Montana, alleging among other claims that I-137 worked an unconstitutional taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution, and that I-137 unlawfully impairs the obligation of contracts between petitioners and the State of Montana in violation of Article I, Section 10 of the United States Constitution. The federal district court stayed its consideration of the Contracts Clause claim under *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), and dismissed without prejudice petitioners' taking claims as unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As petitioners concede at the outset of their petition, they have attempted to revive their claims in the federal district court case, and notwithstanding their petition they have opposed the State of Montana's

motion to dismiss that action. Pet. App. 8a, ¶ 16; Pet. 6 n.1, 14 n.2.

5. The same day that petitioners filed their federal complaint, they filed a complaint in state district court alleging twelve separate counts, including claims under the federal and state contracts clauses, and the state takings clause. Pet. App. 48a, 55a-56a. On December 9, 2002, the state district court granted the State's motion for summary judgment on the contract clause and takings claims. Pet. App. 55a, 58a.

a. The district court rejected the contract clause claims, finding that "[n]one of the written contracts between these parties obligates the state of Montana to allow open-pit mining along with cyanide heap-leaching on the land subject to mineral leases." The court added that "[w]hile this may have been what the Venture intended, the state of Montana nowhere agreed to allow such a proposal." Pet. App. 51a. Indeed, "the written contract between the parties acknowledged that there might be a change [in environmental regulations] and, if there was, that the Venture would be subject to any such change." Pet. App. 55a. Alternatively, the court also held that environmental protection was a significant and legitimate purpose to which I-137 was reasonably related. Pet. App. 53a-55a.

b. The court also rejected the takings claims, holding that "[t]he Venture did not have a property right to conduct [open-pit cyanide heap-leach mining] on the leases here in question." Nor had the Venture "even obtained a[n] operating permit to mine, and its activities were subject to all environmental regulations." Additionally, the court noted that "I-137 does not affect the Venture's other

potential uses of the mineral leases or a way to exploit them." Pet. App. 58a.

6. The Montana Supreme Court affirmed. Pet. App. 3a.

a. On appeal, petitioners argued that they "had a property right in 'the opportunity for a favorable ruling on its mining permit application' which existed prior to the passage of I-137." Pet. App. 10a ¶ 22.

Relying upon settled Montana law, the court held that "a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained." Pet. App. 13a, ¶ 27. The court then recounted the pervasive conditional language contained in both the applicable permitting regulations and the mineral leases themselves, concluding "that the Venture's 'opportunity' to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right." Pet. App. 14a-18a, ¶¶ 29-32.

b. In challenging the rejection of their state and federal contract clause claims, petitioners asserted that their various agreements "demonstrate that [they] never agreed to be bound to future laws which would completely ban the use of cyanide heap leaching process, and that I-137 therefore substantially impaired [their] contractual agreements." Pet. App. 23a, ¶ 42.

The Montana Supreme Court analyzed petitioners' contract clause claim under the three-step inquiry this Court conducted in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983), noting that the case has repeatedly provided guidance in previous Contract Clause matters. Pet. App. 22a, ¶ 41 n.16.

Contrary to the district court's finding, the supreme court found a substantial impairment of contract because "the Venture's contractual relationship with the State was nonetheless based on the assumption, held by all parties, that the cyanide heap method would be used." Pet. App. 25a, ¶ 45. However, citing the Montana Constitution's guarantee of "the right to a clean and healthful environment," Mont. Const. Art. II, § 3, the court concluded that I-137 "is based on the significant and legitimate public purpose of protecting the environment." Pet. App. 26a, ¶ 46. The court also held I-137 to be reasonably related to that purpose "[i]n consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws." Pet. App. 28a, ¶ 50. Although petitioners urged the court to apply heightened scrutiny to I-137 based on their assertion that it benefited the State's self-interest, the court refused because Montana's financial contractual interests were actually diminished by I-137, as it "caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of the mining operation, which was expected to be twelve years." Pet. App. 27a, ¶ 47.

ARGUMENT

The decision of the Montana Supreme Court is a sound application of this Court's Contracts Clause and Takings Clause analysis to contract and property rights rooted in Montana law. As such, the decision does not conflict with any decision of this Court, any court of appeals, or any other state court of last resort. Further review is not warranted.

1. Petitioners first ask this Court to "decide whether realty and leases, which provided an opportunity for mining permits, are 'property' protected from uncompensated takings." Pet. 7. By their terms, the agreements at issue show that petitioners never had a vested right to mine using the cyanide heap-leach process.

a. As the principal case upon which petitioners rely explains, this Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The dimensions of property interests "are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). There can be no compensable taking "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Petitioners acknowledge that the property at issue is neither land nor leases, but "an opportunity for mining permits" on the land under the leases. This Court has recognized that mineral estates are a "unique form of property" over which the government, "as owner of the underlying fee title to the public domain, maintains broad powers." *United States v. Locke*, 471 U.S. 84, 104 (1985). Therefore, "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Id.* at 104.

Here, the "bundle of rights" at issue includes the Montana mining laws, mineral leases, and subsequent agreements pertaining to the regulatory process and the lease terms. Montana law prohibits mining without an operating permit, something petitioners failed to obtain. Mont. Code Ann. § 82-4-335(1). The mineral leases themselves recited the broad discretion enjoyed by the State of Montana to impose "reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to" natural resources. All other material agreements conditioned any mining activity upon general compliance with environmental protection laws and regulations as well as specific regulatory approvals, including an EIS and an operating plan. As the Montana Supreme Court found in its "essentially ad hoc, factual inquiries" into the interests involved, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), not one of the agreements, regulations, or laws applicable to petitioners since the inception of their mineral leases guaranteed them a right to mine, let alone a right to mine using the single mining process banned by I-137. In light of these express limitations on petitioners' rights under the mineral leases, the passage of I-137 by the people of Montana "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125.

Petitioners' "opportunity for mining permits" also depended on their active pursuit of those permits, a pursuit the petitioners abandoned beginning in September 1998 (when the DNRC ended the tolling of the primary lease term), two months before the passage of I-137. "[T]his Court has never required the State to compensate

the owner for the consequences of his own neglect." *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (holding lapse of mining interest "upon the failure of its owner to take reasonable actions imposed by law" is not a taking).

b. Petitioners allege the existence of a conflict both among federal appeals courts and between those courts and the Montana Supreme Court "regarding the constitutional standard governing landowner challenges to permit denials." Pet. App. 11. The purported circuit split involves the Montana Supreme Court's use of an analogy to substantive due process property interests it analyzed in *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, 57 P.3d 836. Pet. App. 12a-13a, ¶ 26. According to petitioners, "[t]he cases cited in *Kiely* reveal conflicts among federal appeals courts," conflicts described in another substantive due process case, *George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir.), *cert. denied*, 540 U.S. 824 (2003). Regardless of whether the question presented by *George Washington Univ.* may or may not newly merit review by this Court, however, neither *Kiely* nor a substantive due process claim is the subject of the instant petition.

The second conflict petitioners allege is between the Montana Supreme Court's decision and that of the Court of Appeals for the Federal Circuit in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). That case involved the federal government's subjection of plaintiff's completed mining plan, which met all then-existing regulatory requirements, to the arbitrary veto of an entirely separate (and never before officially involved) sovereign entity, the Navajo Tribe, for the sole purpose of "enabl[ing] the Tribe to exact additional money from a company with whom it had a valid contract." *Id.* at 1438.

Indeed, the Federal Circuit distinguished *United Nuclear* from two cases in which it found no taking because in those cases, as in this case, the government action formed part of the background of reasonable regulation to which all property rights are subject. *Id.* at 1437-38. The first involved a Presidential order barring the operation of nuclear reprocessing plants that threatened the proliferation of nuclear weapons. *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988). The second involved a federal law requiring a mine owner to spend large amounts of money to stabilize its uranium tailings. *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990). These cases, like this case and unlike the pure financial exaction at issue in *United Nuclear*, rested upon an ancient takings principle:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health . . . or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain.

Mugler v. Kansas, 123 U.S. 623, 669 (1887), *cited in Allied General*, 839 F.2d at 1576; *see also M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995) (holding that, despite state's grant of mining permit to plaintiff, federal government's subsequent restriction on mining was not a taking.) The Federal Circuit's decisions support, rather than conflict with, the Montana Supreme Court's decision.

c. Petitioners' final argument for review of its takings claims is a request for this Court to "police state courts that may have a fiscal incentive to protect state coffers at the expense of private property." Pet. 14. Even setting aside the Montana Supreme Court's finding that I-137 deprived state coffers of millions of dollars of royalty income, this argument amounts to little more than a request for this Court to reconsider its opinion last term in *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005). As the Court then observed, "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *Id.* at 2506. Particularly in the complex state administrative context of this case, "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *Id.* at 2507.

While petitioners may find that the federal district court will be unavailable to reconsider the federal claims decided by the Montana Supreme Court, the issues addressed and authorities relied upon show that the state court did, in fact, consider and decide petitioners' federal claims. Pet. App. 3a, ¶¶ 2-5. In any event, as petitioners concede, the federal district court already has granted them their desired federal forum to determine the preclusive effect of the Montana Supreme Court's decision under *San Remo Hotel*. Pet. 14 n.2. This Court need not intervene.

2. In seeking review of their Contracts Clause claim, petitioners invite this Court to expand the limited application of heightened scrutiny under the Contract Clause beyond financial contracts to include "all impairments by a state of its own contracts," even where, as here, the impairment works to the state's financial disadvantage. Pet. 15. Relying mainly on commentary with scant reference to the contracts and alleged impairment at issue, petitioners would abstract beyond its rationale the state financial self-interest rule of *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Neither *United States Trust* nor this Court's subsequent application of the Contracts Clause leads to petitioners' conclusion. Absent any asserted conflict among lower courts or between the Montana Supreme Court and this Court, petitioners' Contracts Clause claim does not merit review.

a. *United States Trust* involved New Jersey's and New York's direct impairment of a debt obligation, a "purely financial" contract "the Court has regularly held that the States are bound by." 431 U.S. at 24-25. Rather than according its usual deference to the legislature, the Court carefully scrutinized the impairment to determine whether it "was both reasonable and necessary to serve the admittedly important purposes claimed by the state" because "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 29. Deference to a state's justification of financial self-interest would be misplaced, for "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at

26. But the rule applies only in cases of financial benefit to the state; impairment even of a financial obligation would fall outside the reasoning of *United States Trust* if the impaired provision protected nonpecuniary interests similar to those served by I-137: "the State's promise to continue operating the [financed] facility . . . surely could not validly be construed to bind the State never to close the facility for health or safety reasons." *Id.* at 25.

Based upon the record at summary judgment, the Montana Supreme Court found that "[t]he passage of I-137 caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of mining operation which was expected to be twelve years." Pet. App. 27a, ¶ 47. Thus, the Court declined to apply the heightened financial self-interest standard of *United States Trust* because "though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage." *Id.* Petitioners deride this finding as "simplistic" because "I-137 allowed it to regain – without paying any compensation – Petitioners' valuable and improved lease properties containing mineral deposits worth hundreds of millions of dollars." Pet. 18-19. Yet simply put, the mineral leases reverted to the State of Montana (by their terms) subject to the same regulations that petitioners claim rendered them valueless; whatever possible diminution in value the I-137 cyanide heap-leach process ban caused to the mineral estate, the public owner suffered the same as the private lessee. The fact that the State of Montana might have incurred losses to its own mineral wealth as a result of I-137, if true, would argue against heightened scrutiny, not for it. Petitioners therefore offer no plausible explanation of how I-137, a ballot measure enacted not by a legislature

to protect its appropriation capacity, but by the people themselves to protect their health and safety, serves the state of Montana's self-interest in such a way to subject it to heightened scrutiny under *United States Trust*.

b. A second important distinction between this case and those cases where a state's self-interest draws careful scrutiny is the general applicability of a police power exercise such as I-137, as opposed to the repeal of a specific financial covenant such as that involved in *United States Trust*. The ban on cyanide heap-leach processing "did not proscribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance a broad societal interest." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (quotation and citation omitted). The severance tax pass-through prohibition at issue in *Exxon* did not contravene the Contracts Clause because its effect on existing contracts "was incidental to its main effect" of protecting consumers. *Id.* at 192. Similarly, the "substantial sums of money" petitioners claim to have lost, Pet. App. 69a, were not due them by the terms of any contract they held with the state of Montana, but, like any investment involving a regulated matter, were subject to the incidental effect of a generally applicable law. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (rejecting Contracts Clause challenge to law where "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.").

In addition to the "generally applicable rule" inquiry, "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather

than providing a benefit to special interests." *Id.* at 412. The environmental protection measure enacted by I-137 serves more than a legitimate public purpose; it serves purpose of constitutional dimension under Montana's Constitutional guarantee of a "clean and healthful environment." Mont. Const. Art. IX, § 1(1); *Montana Environ. Info. Ctr. v. Department of Envir. Quality*, 1999 MT 248, ¶¶ 63-64, 988 P.2d 1236, 1246 (recognizing as fundamental the right to "clean and healthful environment," and imposing strict scrutiny to state action implicating that right).

c. Petitioners' moral and policy arguments to extend heightened scrutiny to all impairments of state contracts, Pet. 17-19, should fail. It is rather late in the day to read the terms of the Contracts Clause as imbued with absolute "notions of fairness" requiring that "*government must keep its word*," Pet. 17 (*citing* Laurence H. Tribe, *American Constitutional Law*, §§ 9-10 at 619 (2d ed. 1988)), its police power notwithstanding, or to insist that an "imperative that government accommodate private expectations by acting only pursuant to rules fixed and announced beforehand," Pet. 18 (*citing* Note, *Rediscovering the Contract Clause*, 97 Harv. L. Rev. 1414, 1427 (1984)), overrides the expressed health and safety demands of its citizens. This Court long ago determined that the Contracts Clause "is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 428 (1934). "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Id.* at 435.

In this light, and contrary to petitioners' complaint that "it will often be difficult to identify whether the State is acting in whole or in part to further its financial interests distinct from some other form of self-interest," Pet. 18, any rule beyond the financial self-interest rule of *United States Trust* would prove unworkable: by definition, anything within a state's police power "authority to safeguard the vital interests of its people," *Blaisdell*, 290 U.S. at 434, could be considered "some other form of self-interest." Petitioners offer no principled limit to their proposed rule invalidating the application of any law that impairs any contract with the state regardless of financial benefit, for there is none. Instead, attempted enforcement of such a sweeping and unwarranted intrusion into state action would soon evince the wisdom of Justice Holmes in his observation that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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